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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-1499

CHICKYEE MILLAR TSOI,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

Petitioner seeks to review the opinion of the Court of Criminal Appeals of Texas, reported at 489 S.W.2d 103.

JURISDICTION

The decision of the Texas Court of Criminal Appeals was handed down on September 25, 1972. Petitioner's

Motion for Rehearing was denied on December 20, 1972, and his Second Motion for Rehearing was denied on January 31, 1973. While the formal jurisdictional requisites would seem to be satisfied, Respondent disputes Petitioner's contention that rights guaranteed by the United States Constitution were denied to Petitioner.

QUESTION PRESENTED

Whether some constitutional right was abridged where Petitioner was charged with rape and a similar encounter with another woman was introduced into evidence, initially over defense objection, but where later the defense attorney agreed to the introduction of a tape recorded conversation with the second woman wherein the incident of the assault on her was recounted?

STATEMENT OF THE CASE

Petitioner was tried and convicted for the rape of Suzan Upchurch. The victim identified Petitioner as her assailant at the trial, testifying that she had seen his face, heard his voice with its unusual accent, and felt his distinctive hair all of which added up to a recognition of Petitioner as her assailant.

Identification being questioned by the defense, the state offered the testimony of Rosalind Ellis who was unsuccessfully assaulted by Petitioner in a situation similar to the attack on Suzan: a knock on the victim's door, face concealed upon the intended victim's answering the door, a forceable entry into the premises and the use of a pistol to accomplish or attempt to accomplish rape.

Further note is made that Petitioner was captured after

an abortive attempt to make an entry into the apartment of Cynthia Louie. This occurrence also resembled the Suzan Upchurch situation in that, both had advertized for a roommate in a newspaper.

Petitioner's conviction was upheld by the Texas Court of Criminal Appeals and these certiorari proceedings followed.

ARGUMENT AND AUTHORITIES

Petitioner attacks only the introduction of the testimony of Rosalind Ellis in which she described the attack made upon her by Petitioner.

Such evidence is generally admissible under the rule that permits the proof of extraneous crimes to show plan, design, scheme and identification. But whether generally admissible, or not, Petitioner waived any objection to such evidence by agreeing to the introduction of the tape recording of an interview with Rosalind Ellis, made by Petitioner's attorney, in which she recounted the details of her encounter with Petitioner.

However, without regard to an evidentiary rule sanctioning extraneous offense in certain situations and without regard to waiver the issue by Petitioner, the introduction of extraneous crimes does not give rise to a federal constitutional question.

Evidence of other crimes is material to show guilt or innocence. A person who has been shown to have assaulted one woman is more likely to be guilty of the rape of another than a person who has never assaulted a female. It is only an evidentiary rule that prevents the use of similar

acts or crimes—a rule that weighs the probative value of the evidence against the inflamatory aspects of the evidence.

Since the evidence here was material, relevant and probative, no federal question is presented for the fashioning of evidentiary rules is left to the states. *Spencer v. Texas*, 385 U.S. 554 (1967). Any holding to the contrary would constitute "a wholly unjustifiable encroachment . . . upon the constitutional power of states to promulgate their own rules of evidence to try their own state-created crimes in their own state courts . . . " *Spencer v. Texas*, 385 U.S. at page 568.

CONCLUSION

For the reasons advanced above, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been deposited in the United States mail, postage prepaid, certified on this the _____ day of October, 1973, to the following address: Mr. Dick DeGuerin, Foreman & DeGuerin, 512 First National Life Bldg., Houston, Texas 77002.

LONNY F. ZWIENER
Assistant Attorney General